

Nuremberg: Past, Present, and Future

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Nuremberg and Vietnam: An American Tragedy. By Telford Taylor. Chicago: Quadrangle Books, 1970. Pp. 224. \$5.95 (clothbound), \$1.95 (paperback).

"What happens in Nuremberg, no matter how many objections it may invite, is a feeble, ambiguous harbinger of a world order, the need of which mankind is beginning to feel."¹ These words addressed by Karl Jaspers to the German people shortly after the end of World War II have peculiarly vivid relevance to the situation Americans now must deal with in relation to the momentous issues of war crimes and individual responsibility presented by the continuing American involvement in the Indochina War.

Whatever else, Telford Taylor's book, *Nuremberg and Vietnam: An American Tragedy*, helped greatly to move the issue of war crimes and individual responsibility toward the center of public consciousness in this country. Professor Taylor's credentials of career and craft, his balanced and lucid style of analysis, and his lawyer-like restraint made his contention that America's involvement in Vietnam was, in many respects, criminal in the Nuremberg sense much more difficult to shrug off than some of the prominent earlier efforts, directed at mobilizing anti-war sentiment, to demonstrate the same conclusion.² Also, Professor Taylor's timing was superb. His book rode the crest of indignation, confusion, and concern that was created by the sensationalism of the disclosures of the My Lai massacre and the prosecution of some of the leading participants. In addition, anti-war veterans were beginning to speak out on their experiences in the combat theater that routinely involved intentional killing and cruelty toward innocent Vietnamese civilians. And, finally, Taylor's book came out at a time when pro-war

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1. K. JASPERS, *THE QUESTION OF GERMAN GUILT* 60 (1947).

2. See *AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL* (J. Duffett ed. 1968) [hereinafter cited as DUFFETT]; *IN THE NAME OF AMERICA* (S. Melman ed. 1968). The first of these books is the published portion of the Proceedings of the Bertrand Russell Tribunal held in two sessions during 1967, and the second is a comprehensive compilation of newspaper extracts reporting on American battlefield conduct, sponsored by an interdenominational group of leading American clergymen. The documentation, although one-sided, remains in my view largely accurate and is generally consistent with subsequent, more balanced assessments, such as Taylor's, of allegations of criminal conduct by the United States. For a sympathetic and incisive consideration of Taylor's book, see Boudin, Book Comment, 84 HARV. L. REV. 1940 (1971).

sentiment had virtually vanished from the scene and the political debate was confined to disagreement about exit strategies.³ The recital of these factors is not, of course, meant to draw attention from Professor Taylor's central achievement in writing on this difficult and controversial subject an illuminating book that conveys a great deal of knowledge and wisdom in relatively few pages.

The war goes on, however, and the debate evolves. Professor Taylor has been a vigorous participant in this debate and has since developed his position in response to criticism and the pressure of events.⁴ In the late spring of 1971 a portion of the so-called Pentagon Papers was placed in the public domain and managed to dissolve many carefully cherished ambiguities about the motives, intentions, and objectives of Washington's leading policy-makers with respect to America's involvement in Indochina. When the full corpus of McNamara's task force study of the history of United States involvement becomes available later this year,⁵ these materials will establish two propositions having a direct and important bearing on Taylor's book:

1. There is clear proof that American civilian and military leaders did not take into account the moral dimension of their decisions to bring high-technology weaponry to bear in massive fashion on a low-technology society.⁶
2. The case against the United States on the aggressive war issue is much stronger than when Taylor was writing his book.⁷

3. There is, of course, confusion as to what constitutes an "exit" from Vietnam and whether President Nixon's policies of phased withdrawal of American combat forces plus "Vietnamization" is an "exit" at all. The irony implicit in a strategy of winning-while-leaving is unabashedly proclaimed in the title of a book by the world's foremost counter-insurgency specialist, Robert Thompson. See R. THOMPSON, *NO EXIT FROM VIETNAM* (1969).

4. I refer particularly to Professor Taylor's assertion that General Westmoreland appeared subject to criminal prosecution if his relation to battlefield atrocities was appraised by the standards of *In re Yamashita*, 327 U.S. 1 (1946), and to his call for the creation of a high-level citizens' commission of inquiry into issues of war crimes and individual responsibility. The former position was reported in N.Y. Times, Jan. 9, 1971, at 3, col. 4, and the latter was taken during a symposium discussion at Columbia Law School, March 20, 1971.

5. Beacon Press has announced its intention to publish in 1971 a complete set of the "Pentagon Papers" as released by Senator Mike Gravel of Alaska. These documents, when generally available, will provide law students and faculty with an exhaustive (although nevertheless incomplete) data base for analysis of the principal legal issues raised by the American involvement. It would serve the national interest in my view if this opportunity is fully used. A conference of law journal editors might be a constructive first step in planning the kind of treatment that seems required. The Government Printing Office has now also published a multi-volume version of the "Pentagon Papers" that is claimed to be over ninety-five per cent complete.

6. See in this connection, the contributions of Gabriel Kolko and Jonathan Schell to *WAR CRIMES AND THE AMERICAN CONSCIENCE* 47-68 (E. Knoll & J. McFadden eds. 1970) [hereinafter cited as *KNOLL & MCFADDEN*]. For fuller accounts see two books by Jonathan Schell: *THE MILITARY HALF* (1968) and *THE VILLAGE OF BEN SUC* (1967).

7. *THE N.Y. TIMES, THE PENTAGON PAPERS* (Gold, Segal & Abt eds. July 1971) [hereinafter cited as *THE PENTAGON PAPERS*] contains many documents pertaining to the decisions to intervene in Vietnamese affairs after 1954, to bomb North Vietnam in 1965, and to

Even before the release of the Pentagon Papers it was clear that the issue of war crimes had developed on its own. The public outcry after Lt. Calley's conviction (inducing presidential gestures of conciliation) and the mere persistence of the war have driven the issue deeper into "the hearts and minds" back here. Furthermore, the irony of putative "war criminals" being rewarded with such jobs as the presidency of the World Bank, the presidency of The Ford Foundation, the editorship of *Foreign Affairs*, and high-salaried professorships at leading American institutions of learning has not been entirely lost on the widening anti-war community in this country—nor, I might add, has the further irony of treating those who have struggled to bring this war to an end as "enemies of the people," as criminals, exiles, or traitors. The situation, then, is one of inflamed awareness, a sense that war crimes have been committed on a large scale by American officialdom, a consciousness that "the system" remains under the control of those who participated or conspired with these "war criminals." As a result, a tension is developing between the *clarity* of the facts and the law on the war crimes issue and the *inability* to bring this clarity to bear on policy, even to the extent of hastening the end of the war.

Under these circumstances the occasion calls for a reconsideration of the approach taken after World War II toward individual criminal responsibility for the war leaders of Germany and Japan. In essence, we need to determine whether those war crimes trials should be viewed as precedents in an evolving legal tradition of individual responsibility or as special events associated with the conditions of victory in World War II which have been by now, *as a result of ensuing patterns of statecraft*, denied any status as legal precedents. Naturally, this issue cannot be resolved in a decisive way, but the question raised underlies the discussion of individual responsibility for American leaders in connection with the Vietnam war and is of vital importance in appraising Professor Taylor's book. In the remainder of this article, then, I will consider the Nuremberg idea as it emerged, as it relates to the present controversy, and as it might evolve in the future.

I. The Nuremberg Idea Reconsidered

It is not surprising that in the present situation people are skeptical about the moral stature of international law in the Nuremberg area.

introduce large-scale American ground forces in 1965. Although a small sample of the full corpus of the "Pentagon Papers," these materials seem ample to enable a court to reach a well-reasoned decision.

There is, indeed, a rebirth of cynical realism, often proclaimed under the peculiar contention that it is excessive moralism—not immorality or even amorality—that has been responsible for the most serious excesses of American battlefield practices in Vietnam.

The underpinning of this dismissal of a kind of ethnocentric moralism and of its replacement by the revival of national interest thinking has been well expressed in a recent article by Arthur Schlesinger, Jr.: "Until nations come to adopt the same international morality, there can be no world law to regulate the behavior of states. Nor can international institutions—the League of Nations or the United Nations—produce by sleight of hand a moral consensus where none exists. World law must express world community; it cannot create it."⁸ On this basis Schlesinger condemns the American war as "immoral" because the *scale* of the commitment

burst the limitations of national interest. Our original presence in South Vietnam hardly seems immoral since we were there at the request of the South Vietnam government. Nor does it seem necessarily contrary to our national interest; conceivably it might have been worth it to commit, say, 20,000 military advisers if this could preserve an independent South Vietnam. But at some point the number of troops, and the things they were instructed to do, began to go beyond the requirements of national interest. This point was almost certainly the decision taken in early 1965 to send our bombers to North Vietnam and our combat units to South Vietnam and thus Americanize the war.⁹

According to Schlesinger it was the moralism of the architects of escalation that "intensified senseless terror till we stand today as a nation

8. Schlesinger, *The Necessary Amorality of Foreign Affairs*, HARPER'S MAGAZINE, Aug. 1971, at 73. A more extreme defense of the exclusion of moral factors from statecraft may be found in M. COPELAND, *THE GAME OF NATIONS: THE AMORALITY OF POWER POLITICS* (1969), especially at 9-130. Of course this kind of approach has been evolved in the much earlier characteristic works of such major analysts of foreign affairs as E.H. Carr, George Kennan, and Hans Morgenthau. These analysts were, in turn, properly reacting (although over-reacting in my view) to certain indulgences in moralism and legalism exhibited by American statesmen and international lawyers; Woodrow Wilson and John Foster Dulles epitomized the kind of moralistic-legalistic orientation that has clearly been as damaging to American thought and action in world affairs as has been that attributable to the cynical-realist critique of it. I have attempted to develop an intermediate position on these issues as they bear upon international law. See R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 41-59 (1970); Falk, *Law, Lawyers, and the Conduct of American Foreign Relations*, 78 YALE L.J. 919 (1969).

9. Schlesinger, *supra* note 8, at 77. It is misleading to talk of "the request of the South Vietnam government" in a situation in which prior American diplomatic and covert interventions had done so much to constitute and sustain in power that governing group. For trenchant observations on the limits of governmental discretion to authorize the destruction of their people and country, see Farer, *The Laws of War 25 Years after Nuremberg*, INT'L CONCILIATION, May 1971, at 29-34. Farer acidly concludes: "An invitation from the local butcher no longer suffices to legitimate a slaughter." *Id.* at 30.

disgraced before the world and before our own posterity.”¹⁰ In essence, this approach associates the immorality of the war mainly with the *disproportion* of the means adopted, given a reasonable construction of the geopolitical ends in view, and argues that had the policy-makers engaged in these sorts of calculations rather than in crusading or missionary claims relating to “freedom,” “commitment,” and “communism,” then the threshold of immorality would never have been crossed. There is an apparent paradox here—immorality arises because moral issues are emphasized as the roots of policy. For Schlesinger this paradox is overcome by realizing that statist imperatives of rival national governments prevent the formation of any moral consensus in world society, and by finding that the invocation of moral considerations as a justification for national policy is a self-serving *moralism* that prevents the operation of the only kind of *morality* possible on an international level—namely, the prudential calculation of means and ends. Within such a framework, law follows morality, and the role of law is confined to reinforcing the logic of the moral order. As such, it would be appropriate to limit the role of law to questions of *means*, not *ends*.

But what, then, of Nuremberg as a basic orienting tradition? Clearly, the logic of Nuremberg rests on a moral order in which the *ends* of policy are crucial and in which the assessment of means is based on their *intrinsic* character as well as by links of *proportionality* to ends. That is, the prime effort at Nuremberg was to regard “aggressive war” both as illegal and as entailing individual criminal responsibility for its principal planners. In the language of the Judgment: “To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”¹¹ Such a position rests on the view that it is the nature of the war policies, not their proportional relationship to the national interests at stake, that is the basis of moral and legal appraisal. In Schlesinger’s terms the whole effort by Japan to wage war to expand its zone of economic and security control would appear to have been a reasonable, if ultimately disastrous, calculation of means/ends in the context of national interest. The Tokyo Tribunal found that aggression was committed by Japan because of its initiation of the war by

10. Schlesinger, *supra* note 8, at 77.

11. Quoted in L. SOHN, CASES AND OTHER MATERIALS ON WORLD LAW 936 (1950).

military attacks.¹² And certainly it is this view of the central teaching of Nuremberg that underlies Taylor's view of the relevance of legal criteria to war policies.¹³ But oddly enough even Schlesinger argues that "the Charter, Judgment, and Principles of the Nuremberg Tribunal constitute, along with other treaties, rudiments of an international consensus" that warrant enforcement:

Such documents outlaw actions that the world has placed beyond the limits of permissible behavior. Within this restricted area a code emerges that makes moral judgment in international affairs possible up to a point. And within its scope this rudimentary code deserves, and must have, the most unflinching and rigorous enforcement.¹⁴

Schlesinger seems confused about the content of Nuremberg, as well as about the extent to which his endorsement of substantive rules does not comport with his insistence on means/ends judgments rather than intrinsic appraisals of foreign policy. He writes that these "international rules deal with the limits rather than with the substance of policy," and, as such, "do not offer grounds for moral judgment and sanction on normal international transactions (including, it must be sorrowfully said, war itself, so long as war does not constitute aggres-

12. On the Japanese case for initiating hostilities, see the long dissenting opinion of Judge R.B. Pal of India in the Tokyo war crimes trials, reprinted in *INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST* (1953) (Dissentient judgment of Justice R.B. Pal) and R. MINEAR, *VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971). See also the valuable discussion in N. CHOMSKY, *AMERICAN POWER AND THE NEW MANDARINS* 170-208 (1969).

13. At Nuremberg, three categories of offenses were regarded as "punishable as crimes under international law:"

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

This is the formulation relied upon in the Nuremberg Charter and Judgment and carried forward in the "Nuremberg Principles" as set forth by the International Law Commission in 1950. There is no reason to question its authoritativeness so far as reporting on what was decided at Nuremberg, although the authoritativeness of Nuremberg itself is, of course, a separate matter.

14. Schlesinger, *supra* note 8, at 78.

sion and so long as the rules of warfare are faithfully observed)."¹⁵ But, of course, this is as much as the most morally and legally inclined analyst would contend. Why, then, does Schlesinger write with such indignation about "moral absolutism" as a "malady" that "may strike at any point along the political spectrum"? Why does he state that "[f]rom the standpoint of those who mistrust self-serving ethical stances, the heirs of John Foster Dulles and the disciples of Noam Chomsky are equal victims of the same malady. Both regard foreign policy as a branch of ethics."¹⁶ This strikes me as sheer nonsense in light of Schlesinger's earlier comments on Nuremberg and wars of aggression. Clearly, in the context of Indochina, Noam Chomsky (and his disciples) have done nothing more than to document his conclusions about the aggressive character of the war and the barbarous tactics by which it has been waged. How can Schlesinger possibly explain his Vietnam position as merely one of the *degree* of violence used to crush the National Liberation Front? One can, to be sure, contend that carrying the war beyond a certain point was stupid ("counter-productive" as the authors of the Pentagon Papers tend to put it), but surely it did not become "aggression" at some point because of an increase in its magnitude.¹⁷

Something very fundamental is exhibited by Schlesinger's confusion. Oddly enough, given Taylor's background and intellectual rigor, the same confusion lies latent in his book. Richard Wasserstrom has mounted a strong attack on Taylor, properly calling attention to the opening of the final paragraph of the book which Taylor begins as follows: "One may well echo the acrid French epigram and say that all this 'is worse than a crime, it is a blunder'—the most costly and tragic national blunder in American history."¹⁸ Wasserstrom goes on (in my opinion unfairly) to say that "Taylor's point of view is defective, inadequate, and dangerous because unlike him (and the French,

15. *Id.*

16. *Id.*

17. It is true, of course, as I have argued elsewhere, that as certain thresholds of escalation were crossed the issue of aggressive war became easier to analyze from a legal point of view. The most important of these thresholds was the decision to carry the air war to North Vietnam which was put into operation in February of 1965. As long as the violence was confined to South Vietnam, and conflicting allegations of intervention were being made, it was difficult to resolve the major issues of fact and law. See generally Falk, *International Law and the United States Role in the Vietnam War* and Falk, *International Law and the United States Role in the Vietnam War: A Response to Professor Moore*, in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 362-401, 445-503 (R. Falk ed. 1963), especially at 375-81, 490-94.

18. T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 207 (1970) [hereinafter cited to page number only].

apparently) I happen to believe that crimes are much worse than blunders."¹⁹ What Wasserstrom is on to is Taylor's effort to appear realistic and tough-minded. The risk with so doing is to appear both hopelessly confused and basely insensitive; it is one thing to reject the Nuremberg tradition out of hand as dangerous humbug, but quite another to affirm its relevance, as does Taylor, in such a way that Pentagon and State Department hardhats in the Acheson-Kissinger tradition won't slam the door in your face. Liberals in the Kennedy-Johnson mold of Schlesinger (and probably Taylor) want it both ways—to be in on the talk because they know what international conflict is all about and to remain somehow in touch with such minimal traditions of human decency as are embodied in the Nuremberg tradition.²⁰

This kind of normative (moral/legal) ambivalence is, I think, a characteristic of a period of transition within international life itself. I have tried to depict both the normative tension and the transition process in relation to the interplay between the *statist* imperatives of the Westphalia tradition and the *communitarian* drift of the Charter tradition.²¹ The Westphalia tradition is a shorthand description of the system of world order that has prevailed in international life since 1648 when the Peace of Westphalia was concluded at the end of the Thirty Years War. The main characteristic of this system is the acknowledgment of the sovereignty of national governments in domestic and international affairs. The Charter tradition, which is as yet far weaker and of much more recent origin, can be understood as

19. N.Y. REVIEW OF BOOKS, August 12, 1971, at 30. See also the letter in support of Taylor's treatment by Professor Jonathan Mirsky to which Wasserstrom is here addressing himself. *Id.* For Wasserstrom's full critique of Taylor's approach, see *Criminal Behavior*, N.Y. REVIEW OF BOOKS, June 3, 1971, at 8-13.

20. Given the character of nuclear war and large-scale counter-insurgency war, it seems increasingly difficult to argue on behalf of maintaining effective legal limits during a period of warfare. The bases of the laws of war involve the capacity to maintain distinctions between military and non-military targets with sufficient clarity to establish some consistent limits upon the concept of "military necessity." I am increasingly persuaded that it is not possible to maintain such limits given the technology and doctrines of modern warfare, and, therefore, feel that the law of war must virtually presuppose a pacifist orientation if it is to serve any serious purpose in the future. For a very important argument against this view, but in a somewhat earlier setting, see the influential article of Josef Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 AM. J. INT'L. L. 37 (1951). Taylor's endorsement of the laws of war is also relevant. See pp. 39-41.

21. I have set forth this analysis in Falk, *The Interplay of Westphalia and Charter Conceptions of the International Legal Order*, in 1 *THE FUTURE OF THE LEGAL ORDER* 32-70 (G. Black & R. Falk eds. 1969). For a broader analysis along similar lines, see R. FALK, *THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL* (1971). Whether the Westphalia tradition is waning and the Charter tradition waxing is a difficult question, since the emergent nationalism of the Afro-Asian world and the rise of cosmopolitanism and militant subnationalism in Europe and North America must both be taken into account.

seeking to qualify the discretion of sovereign governments in the area of war and peace through the establishment of rules of restraint and the creation of international institutions of review. One consequence of the coexistence of these two approaches to the organization of international life is the exposure of a number of contradictions between sovereign discretion at the national level and community judgment at the global or regional level. The present structure of power and authority in the world order system is weighted down on the Westphalia side of the seesaw. Principal governments control military capabilities and exercise effective discretion over their employment. The political organs of the United Nations function mainly as instruments of statist diplomacy rather than as world community actors of the sort envisaged by much of the language of the United Nations Charter.²² These considerations make it appear, on one level, naive and misguided to invoke the Nuremberg tradition as a basis for judging the dominant actors in world affairs. What is the point of fulminations put forward in moral and legal language against the powerful and mighty? The only realistic hope, given this outlook, is to persuade them that it is contrary to their own welfare to wage wars that do not promote the national interest. Hence the practical appeal of Schlesinger's plea for amorality and a sober national interest calculus; hence, also, Taylor's tendency to allow his critique of the Vietnam War to confuse its military failure as an exercise in intervention with its normative status as an aggressive war involving criminal tactics. It is revealing that Taylor acknowledges that he was "one who until 1965 supported American intervention in Vietnam as an aggression-checking undertaking in the spirit of the United Nations Charter," and then, like Schlesinger, goes on to emphasize the drastic changes in that year in "the nature, scale, and effect of intervention" as the decisive elements in altering his attitude.²³

Some of this ambivalence is embedded in the Nuremberg experience itself. Only the victorious nations participated in setting up the Tribunal and passing upon the charges.²⁴ More important, ghastly Allied actions

22. For a full statement of this proposition, see Falk, *The United Nations: Various Systems of Operation*, in *THE UNITED NATIONS IN INTERNATIONAL POLITICS* 184-230 (L. Gordenker ed. 1971).

23. P. 206. It is important to realize that by 1965 more than a year had passed since the assassination of Ngo Dinh Diem, the Geneva Accords had been partially repudiated, an overt United States role in a large-scale counter-insurgency war had been revealed, the Gulf of Tonkin incident had occurred, and the Resolution bearing that name had been passed.

24. The Tribunal for the Far East convened at Tokyo, had wider representation than did Nuremberg and generated dissenting and concurring opinions.

in the war such as the destruction of Dresden, the fire-bombing of Tokyo, and the atomic bombing of Hiroshima and Nagasaki were kept outside the orbit of war crimes inquiry. Standards of negative reciprocity were relied upon, namely, that the leaders of the defeated states brought before the bar of international justice were not charged with any actions—such as submarine attacks without prior warning or the bombardment by air of enemy cities—that were also the common practice of the victorious side. Such forbearance at Nuremberg can be interpreted to mean that *anything* the victor does is beyond condemnation as *criminal* and that the defendant might succeed with a *tu quoque* argument. So interpreted, Nuremberg is deeply flawed if understood as moral education. However, there is more to Nuremberg than its Judgment. Certainly part of the experience was the creation of a precedent contributing to an international learning experience on world order that would, with the passage of time, broaden its significance beyond the original circumstances of its application. Part of the ideology of Nuremberg itself was contributed by Mr. Justice Robert Jackson, the Chief Prosecutor for the United States at the Nuremberg Trials, in his celebrated assertion that “[i]f certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.”²⁵ Certainly Professor Taylor’s book is a testimonial to the accuracy of Jackson’s prediction.²⁶ The United States has not been defeated in Indochina in anything like the way that Germany was defeated in World War II. The military mission has failed and has been widely discredited, but the military and economic prowess of the country remains preeminent in world affairs. Nuremberg has reached beyond itself when applied to Vietnam, and this moral growth, so to speak, was implicit within its initial historical dimensions.

Those who are working for a new world order system based upon some form of effective central guidance in matters of war and peace reject as obsolescent and regressive the “realism” of national interest approaches to foreign policy. There is a new realism emerging out of the need to adapt the state system to the multiple challenges of war, population pressure, global pollution, resource depletion, and human

25. Quoted in *CRIMES OF WAR* 222 (R. Falk, R. Lifton & G. Kolko eds. 1971).

26. In this regard, even Schlesinger’s affirmation of the Nuremberg tradition suggests the reality of the precedent set after World War II.

alienation.²⁷ It is this new political consciousness that insists upon regarding America's involvement in the Indochina War as illegal and immoral *from the beginning* in the late 40s and early 50s. Such an assessment can be made more authoritatively since the publication of the Pentagon Papers.²⁸ But the main point is that we are in a situation of transition from one world order system to another, from a statist logic which is *no longer adequate* to a normative logic associated with the United Nations Charter and the Nuremberg Principles that *does not yet pertain*. In the midst of such a process rigid distinctions between what the law "is" and what it "ought to be" obscure the central reality of movement from one position to another. Those who identify with a progressive vision of world order are primarily agents of value change. In this sense, to pass judgment on one's own government, to discredit those who planned and waged aggressive warfare in Vietnam for so many years, and to seek an application of the Nuremberg concept is to embody the future in the present to some small extent. We become—in a normative way—what we do.

II. Problems of Application: Wars without Victors

The facts available make it increasingly evident that the United States has violated the Nuremberg Principles, and that its chief policy-makers could be prosecuted before a Nuremberg-type court for crimes in all three categories.²⁹ In this section I address the question of what action is appropriate given the unavailability of a proper adjudicating tribunal. Since the evidence is now increasingly available to support

27. One interesting recent effort to demonstrate the dangers of world catastrophe embodied in present patterns of human behavior and political organization is J. FORRESTER, *WORLD DYNAMICS* (1971). See also the material prepared by the Club of Rome's Project on the Predicament of Mankind under the direction of MIT Professor Dennis L. Meadows, especially Phase One: Dynamics of Global Equilibrium, D-1550-1, April 1971 (mimeographed pamphlet).

On the level of intuition and consciousness, the need for drastic change has been understood in a variety of distinct modes. Among those that I have found congenial and significant are the following: E. KAHLER, *THE TOWER AND THE ABYSS* (1957); D. LESSING, *THE GOLDEN NOTEBOOK* (1962); D. LESSING, *BRIEFING FOR A DESCENT INTO HELL* (1970); C. REICH, *THE GREENING OF AMERICA* (1970); several songs by the Beatles, vintage 1963-69 (e.g., "Blackbird," "Revolution 1," "Revolution 9") and by Bob Dylan (especially "Blowin' in the Wind"). The point here is that there are many converging perceptions of the objective situation that complement one another in a period during which traditional beliefs and structures are dangerously outmoded. Legal and political analysis needs to be made more receptive to these more literary sources of understanding, if for no other reason than the basic imperative of sanity—to obtain a better fix on reality.

28. See, for example, the report on United States counter-insurgency operation in Vietnam, including North Vietnam, in the 1954-55 period, prepared by Col. Edward G. Lansdale, head of the so-called "Saigon Military Mission," reprinted in *THE PENTAGON PAPERS*, *supra* note 7, at 53-66.

29. See note 13 *supra* for a specification of the three categories of crimes.

allegations of criminality, the non-availability of an adjudicating forum is at present the most crucial policy issue.

The Nuremberg concept presupposed an Allied victory in World War II. In the context of the Vietnam War there is no prospect that the United States will be defeated in the sense of surrendering to North Vietnam or the National Liberation Front.³⁰ The other side would not, as a consequence, be in a position to convene a tribunal that would hear charges against United States military and civilian leaders.³¹ Moreover, the organized international community has neither the will nor the capability to proceed against the most powerful country in the world. There is no prospect, in other words, of bringing United States leaders before the bar of international justice, even as it was so imperfectly enacted at Nuremberg.

There is some sentiment among legalistic observers who argue that the inability to convene an international war crimes tribunal should put to rest, once and for all, allegations about war crimes. Taylor is somewhat ambiguous about his own position. On the one hand, he says that at the end of the war crimes trials after World War II

[t]he United States Government stood legally, politically and morally committed to the principles enunciated in the charters and judgments of the tribunals. The President of the United States, on the recommendation of the Departments of State, War

30. The notion of "victory" in this kind of conflict is elusive. There is some validity to the well-known observations of Henry Kissinger on this point that were written before he entered the Government as Mr. Nixon's principal foreign policy adviser: "We fought a military war; our opponents fought a political one. We sought physical attrition; our opponents armed for our psychological exhaustion. In the process, we lost sight of one of the cardinal maxims of guerrilla war: the guerrilla wins if he does not lose. The conventional army loses if it does not win." Kissinger, *The Viet Nam Negotiations*, 47 FOREIGN AFFAIRS 211, 214 (1969). But "victory" in this sense still does not carry with it any prospect of access to potential enemy defendants in a war crimes trial.

31. Of course, it is possible to convene a tribunal or commission of inquiry without access to American defendants. The Russell Tribunal was the most prominent effort that has been made to carry on such an inquiry. Its findings were disregarded for a variety of reasons having nothing to do with whether or not the central conclusions were well-founded. For proceedings of the Russell Tribunal, see DUFFETT, *supra* note 2. It is virtually impossible to expect those ruling groups that are the main target of such accusations to allow this kind of procedure to attain much credibility in the public mind. Part of the issue here is the extent of government monopoly over the definition of "legitimate action." Radical anti-war efforts have, whether articulately or not, always presupposed some role for individual and popular judgment in assessing the nature of "legitimacy," and have increasingly perceived the gap between personal morality and governmental action as being indicative of a loss of legitimacy by the state rather than as an upsurge of lawless impulses and attitudes on their part.

Another possibility is that a Nuremberg-type tribunal might be constituted in Vietnam, Laos, Cambodia, or for all of Indochina to inquire into the commission of war crimes and that some actual defendants (mainly Indochinese) would be prosecuted. Such an eventuality depends on the way the various facets of the Indochina War come to an end, and, most particularly, on whether the leaders of the losing side negotiate, abdicate, or surrender power.

and Justice, approved of the war crimes programs The United States delegation to the United Nations presented the resolution by which the General Assembly endorsed the Nuremberg principles. Thus the integrity of the nation is staked on those principles [of Nuremberg]³²

In short, we created a precedent intended to bind ourselves in the future. On the other hand, Taylor does not deal at all directly with these difficult issues of application in the altered setting of the American involvement in Vietnam. Indeed, Taylor comes down hard against entrusting domestic courts in the United States with any role in assessing the legal status of the American involvement or the battlefield tactics relied upon. Thus, despite a reasonably clear set of judgments in the book that a Nuremberg problem has been created by our role in Vietnam, there is absolutely no guidance given as to what can (or should) be done about it. Taylor has said in response to this criticism of his book that he regards the question of application as "a political one"³³ outside the scope of his technical competence. I suppose it is "political" in the sense of involving the current mood of public opinion. Obviously, if ninety per cent of the American public (rather than a tiny number—say one per cent) was clamoring for war crimes trials against Westmoreland, Abrams, Rusk, Rostow, and others, then there would be a powerful movement in this country to constitute some sort of tribunal.

There are also, however, serious legal questions presented. The growth of international law has always depended on the vigor of its domestic enforcement. The absence of an international tribunal is not indispensable to serious judicial treatment of war crimes issues. After all, the *Eichmann* case was heard before a domestic court in Israel, and there is a Security Council Resolution calling upon nations to use their domestic legal system to punish World War II war criminals.³⁴ In a variety of areas, ranging from the apprehension of international pirates (and more recently hijackers) to the enforcement of antitrust

32. P. 94. See also Farer, *supra* note 9, at 12: "For our immediate purposes the central point of this excursion in legal theory is that the drafters of the Nuremberg Charter were acting consciously and conscientiously to establish a manifestly legal process, the outcome of which would be a set of persuasive precedents."

33. This position was formulated very clearly by Taylor at the symposium on war crimes. See note 4 *supra*.

34. The Security Council made a distinction in the *Eichmann* context between the abduction of Eichmann by illegal means in Argentina and the duty of all governments to pursue and prosecute alleged war criminals of the Nazi period. U.N. Doc. S/4349 (1960). The Argentine government had a duty to apprehend and prosecute Eichmann or at least cooperate in turning him over to a government that would prosecute.

and expropriation norms, domestic courts have performed valuable functions when international tribunals were non-existent or unable to act.³⁵ Furthermore, a particularly strong case for the development of a more active judicial role³⁶ could be made in light of certain tendencies to downgrade Congress' constitutional role. The expansion of executive prerogatives has eroded the constitutional scheme envisioned by the framers and led to other undesirable effects as well.³⁷ In particular, the presidential power to maintain secrecy and to manage the release of news has virtually nullified the development of legal restraints on war-making at the global level.³⁸

Taylor advances a number of grounds for concluding that a domestic court should not undertake inquiry into the legality of the American involvement in the Vietnam War, either on constitutional grounds of executive usurpation of congressional privilege, or on international law grounds of incompatibility with treaty obligations to refrain from non-defensive (or aggressive) uses of force.³⁹

(1) To resolve the issue would require "the examination of hotly controverted evidentiary questions" for which much relevant material

35. My own views on these issues are set forth in R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964), especially at 1-20. See also Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9 (1970).

36. The most comprehensive discussion of the role of domestic courts in relation to this subject matter is to be found in L. VELVEL, *UNDECLARED WAR AND CIVIL DISOBEDIENCE: THE AMERICAN SYSTEM IN CRISIS* (1970), especially at 113-80. See also Wormuth, *The Vietnam War: The President versus the Constitution*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 711-807 (R. Falk ed. 1969).

37. There is a growing literature on these facets of the American involvement in the Vietnam War. Among the more useful are A. AUSTIN, *THE PRESIDENT'S WAR: THE STORY OF THE TONKIN GULF RESOLUTION AND HOW THE NATION WAS TRAPPED IN VIETNAM* (1971); J. GOULDEN, *TRUTH IS THE FIRST CASUALTY: THE GULF OF TONKIN AFFAIR—ILLUSION AND REALITY* (1969); E. WINDCHY, *TONKIN GULF* (1971). See generally H. GALLAGHER, *ADVISE AND OBSTRUCT: THE ROLE OF THE UNITED STATES SENATE IN FOREIGN POLICY DECISIONS* (1969); M. PUSEY, *THE WAY WE GO TO WAR* (1969); *Hearings on U.S. Commitments to Foreign Powers Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. (1967).

On a more general level see T. DRAPER, *ABUSE OF POWER* (1967); D. KRASLOW & S. LOORY, *THE SECRET SEARCH FOR PEACE IN VIETNAM* (1968); F. SCHURMANN, P. SCOTT, & R. ZELINK, *THE POLITICS OF ESCALATION IN VIETNAM* (1966).

These issues of constitutional imbalance underlie inquiry into the decision to disclose the Pentagon Papers so that the public and Congress might know more about past deception and about the manipulation of news by the Executive Branch through well-timed "leaks," "backgrounders," and the like.

38. On the development of international law in this area see Q. WRIGHT, *THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF WAR* (1961). For a more skeptical interpretation of these developments, see J. STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* (1958).

39. It is important to emphasize the distinction here between the "illegality" of a war and its "criminality." Domestic courts have been asked by litigants to rule only on the issue of illegality as it impinges on their rights as citizens. Such rulings are quite different from a determination that particular government leaders are "guilty" of war crimes and, by Nuremberg reasoning, should be held individually responsible.

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is unavailable; these questions involve the quantum and timing of infiltration from North to South Vietnam, the status of the 1954 Geneva Accords, the relevance of the SEATO Treaty;⁴⁰

(2) Unlike the situation after the Second World War, the perception of who is "the aggressor" in the setting of Vietnam is very difficult to adjudicate because even the issue of "who attacked whom" is factually and legally murky; Taylor also stresses here the inability of governments through the years to evolve an agreed definition of aggression;⁴¹

(3) In Nuremberg and Tokyo it was possible for the prosecution to establish intent and motivation by relying on the "proven intentions and declarations" of the defendants;⁴²

(4) Congress has endorsed the war by means of the Tonkin Resolution in 1964 and by voting appropriations since that time;⁴³

(5) The judicial capacity to act in the area of foreign affairs is severely restricted, even if it is not entirely clear whether this is a matter of constitutional requirement or judicial self-restraint.⁴⁴

On these bases Taylor concludes that "the Supreme Court is *not* authorized to render judgment on the validity of our participation in the Vietnam War under the Nuremberg Principles or international law in general."⁴⁵ It is Taylor's view that "[a]fter five years of bloody and costly war sustained by Congressional appropriations, if the President's course is to be checked by another branch of the Government, it is the Congress and not the Court that can and should be the checking agent."⁴⁶ This line of argument is very statist in character, for it overlooks the degree to which the denial of standing and judicial relief to individual citizens raising these legal issues undermines the legitimacy of government.⁴⁷ It should be understood that efforts to gain judicial

40. P. 101.

41. Pp. 101-03.

42. Pp. 103-04.

43. Pp. 107-09.

44. Pp. 109-16.

45. P. 116.

46. P. 117.

47. For extended analysis in a legal context, see L. VELVEL, *supra* note 36, at 183-250. For a broader rationale of recourse to tactics of "illegal" resistance in response to failures by the government to abide by minimum standards of law and morality, see D. BERRIGAN, *THE TRIAL OF THE CATONSVILLE NINE* (1970); B. DEMING, *REVOLUTION & EQUILIBRIUM* (1971); J. MITFORD, *THE TRIAL OF DR. SPOCK* (1969); *WE WON'T GO: PERSONAL ACCOUNTS OF WAR RESISTERS* (S. Lynd ed. 1968). A celebrated discussion of the jurisprudential foundations of these issues in a pre-Vietnam setting is found in the debate between H.L.A. Hart and Lon Fuller. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

relief in relation to the war have grown out of refusals to enter the armed forces or pay taxes—out of refusals, in other words, to contribute to the war. I have argued elsewhere that in this situation “the wider logic of Nuremberg” supports such assertions, whereas Taylor writes that “Nuremberg acquittals of generals and industrialists cut directly against Professor Falk’s argument.”⁴⁸ Not at all. My argument is not based on Nuremberg as a precedent in a strict sense of what was decided there, but rather by conceiving of Nuremberg as a set of directives about individual responsibility in relation to aggressive war-making. In this regard “the wider logic” includes such actions in the Nuremberg setting as President Roosevelt’s appeal of 1944 to the German citizenry on the issue of war crimes:

Hitler is committing these crimes against humanity in the name of the German people. I ask every German and every man everywhere under Nazi domination to show the world by his action that in his heart he does not share these insane criminal desires. Let him hide these pursued victims, help them to get over their borders, and do what he can to save them from the Nazi hangman. I ask him to keep watch, and to record the evidence that will one day be used to convict the guilty.⁴⁹

There is an implicit civic responsibility to resist and oppose any war that it *seems reasonable* to believe is aggressive, and, hence, whose furtherance involves the commission of crimes against peace.

Part of the “wider logic” also involves the generalized responsibility of all actors at every level of social organization to implement the basic Nuremberg directives. The United Nations Security Council has urged governments to facilitate the prosecution of World War II war criminals. By preparing the Nuremberg Principles—merely a codification of what was decided at Nuremberg—the United Nations has set forth general standards of responsibility that pertain to all who hold high public office.⁵⁰

And, finally, the wider logic has to do with giving effect to the Nuremberg concept in other contexts than the prosecution of those leaders responsible for the policy. The effort of war resisters to turn

48. P. 119, and see Falk, *Six Legal Dimensions of the United States Involvement in the Vietnam War*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 216, 250 (R. Falk ed. 1969).

49. Text reprinted in *CRIMES OF WAR* 77-78 (R. Falk, R. Lifton & G. Kolko eds. 1971).

50. The Nuremberg Principles, as such, are not in binding form, but they appear to restate accurately the assumptions and conclusions of the Nuremberg Judgment. In this regard, these Principles provide evidence of the content of customary international law on this subject. For a general consideration of these issues, see C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* (1965).

the legal system against illegal and criminal warfare involves a symbolic effort to use these ideas of personal responsibility to inhibit unrestricted sovereign discretion in the area of war and peace. America is *not* Nazi Germany, and, precisely for this reason, the vulnerability of the war-making apparatus may be in the responsiveness of its institutions to the values embedded in Nuremberg thinking rather than in the vulnerability of the power apparatus to decisive battlefield defeat.⁵¹ "The wider logic" explores the possibilities of enforcing Nuremberg in a situation where "victor's justice" is unavailable, and where the war machine and its underlying criminality persist.⁵²

In responding to Taylor I would like to deal in sequence with each of his five points.

(1) *Evidence of criminal behavior.* Since the publication of the Pentagon Papers there is ample documentary material on which to assess the central issue of whether the United States Government has been waging a war of aggression in Indochina.⁵³ Some difficult issues of interpretation remain, but these issues are not inherently more difficult than those confronting courts in many other areas of the law, nor do they seem to hamper greatly the prospect of reaching a clear conclusion. On the issue of war crimes and crimes against humanity there is less documentary evidence, but there is also less need for it as alternative sources of reliable evidence exist. For instance, there are now

51. See discussion of this kind of consideration in *Epilogue to the German Edition of The Warriors: Reflections on Men in Battle*, reprinted in J. GRAY, ON UNDERSTANDING VIOLENCE PHILOSOPHICALLY AND OTHER ESSAYS 35-43 (1970). "Again and again it has seemed to me that our nation has had unparalleled opportunities in this conflict to declare to the world: we made a mistake, we are wrong, we are going to end this slaughter right now, so far as our troops are concerned. The effect of a strong nation able to make such a drastic break with its past might well have been an electrifying one. To some of us who consider ourselves loyal citizens of the United States, it would have been an occasion of sober joy." *Id.* at 38.

52. The "Nixon Doctrine," the prevailing statement of official policy in light of the Vietnam experience, maintains the same pattern of commitments to foreign governments confronted by insurgent challenges mounted within, or largely within, their own territory. American involvement will include military equipment and heavy air support, but will seek to avoid introducing American troops. For authoritative statement of the Nixon Doctrine, see President Nixon's report to the Congress of Feb. 25, 1971, *United States Foreign Policy for the 1970's: Building for Peace*, 7 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 305, 308 (March 1, 1971). The Nixon Doctrine has been applied to the struggle for control of Cambodia, resulting in heavy destruction and much suffering on the part of the civilian population. For a description, see CAMBODIA: THE WIDENING WAR IN INDOCHINA (J. Grant, L. Moss & J. Unger eds. 1971).

53. But even before the publication of the "Pentagon Papers," it was reasonable to conclude that the United States was guilty of waging aggressive war in Vietnam. Perhaps the most comprehensive analysis along these lines has been prepared under the auspices of the Consultative Council of the Lawyers Committee on American Policy Towards Vietnam. See VIETNAM AND INTERNATIONAL LAW: AN ANALYSIS OF THE LEGALITY OF THE U.S. MILITARY INVOLVEMENT (2d rev. ed. J. Fried rapporteur 1969).

available numerous Vietnam veterans who are willing and eager to testify about the tactics, methods, and weapons of warfare used, and who, in many instances, themselves participated in specific massacres. There is no longer, if indeed there ever was, any reasonable doubt about the main patterns of warfare relied upon by the United States in Vietnam that have been challenged as illegal.⁵⁴ The evidence is there.

(2) *Identity of the aggressor.* It is correct, as Taylor suggests, that the setting of the Vietnam War is different from that of World War II, but I do not find it significantly different. The extension of the combat zone to North Vietnam in 1965 and the character of the interventions by both sides in South Vietnam seem susceptible to legal analysis and inference. Indeed, pro-Administration and anti-Administration legal scholars have long shared the conviction that the law and the facts are clear enough to support an inference of aggression—though they do not agree on who the aggressor is.⁵⁵ Why under such circumstances is it impossible for a court to make a comparable assessment? Indeed, the Government as a whole seems estopped from even contending that it is impossible to identify the aggressor in the Vietnam context since it has itself so frequently argued that it was acting in defense against aggression.

The failure of governments to reach an agreement on the international definition of aggression is surely not a plausible obstacle to a domestic court reaching a determination in relation to specifically challenged conduct. This assertion takes on more weight when it is realized that the growth of American law has proceeded on the assumption that the content of general concepts has generally depended on a case-by-case development rather than by applying some sort of definition agreed to in advance. Indeed, the United States has been a leading opponent of international attempts to define aggression, and has consistently opposed the definitional initiatives of the Soviet Union and others on these general grounds of legal policy. Finally, there was enough clarity about the character of aggression at Nuremberg and Tokyo to permit authoritative inferences of aggression in the absence

54. For comprehensive description, see E. HERMAN, *ATROCITIES IN VIETNAM: MYTHS AND REALITIES* 20-88 (1970); COMM. OF CONCERNED ASIAN SCHOLARS, *THE INDOCHINA STORY* 79-144 (1970).

55. See, e.g., selections on both sides in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 318-508 (R. Falk ed. 1968). But see White, *Misperception of Aggression in Vietnam*, *id.* at 523-40. For a skeptical view of legal interpretation, see Mayda, *The Vietnam Conflict and International Law* in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 260-70 (R. Falk ed. 1969), especially at 268-69.

of a definition. It is not at all clear that striking first is a decisive indicator of the identity of the aggressor (consider, for example, the legal debate about the outbreak of the 1967 Middle Eastern War, or the American threat to use force, if necessary, to prevent the deployment of Soviet missiles in Cuba in 1962) or that there was an undisputed chain of aggressive actions by Germany and Japan and of defensive responses by the Allied Powers.⁵⁶ Taylor's argument that the identity of the aggressors in World War II was clear by comparison with Vietnam is merely self-serving in relation to his conclusion.

(3) *Evidence of intentions.* Taylor's argument here, too, has been undercut by the publication of the Pentagon Papers. Even if these documents are incomplete or onesided, as claimed by most of the principal officials depicted therein, a *prima facie* case has still been made and a burden to come forward imposed on those who would repudiate the available evidence of intentions. Furthermore, the issue before domestic courts would not be the criminality of specific government officials, as to which intent is relevant, but the legality of state action, as to which it is not relevant. If the concerns under (1) and (2) are dissipated, then (3) seems immaterial in many contexts where judicial redress has been sought. This issue of intent seems relevant only to the formation of some Nuremberg-type operation against specifically identified defendants.

(4) *Congressional endorsement.* By now, there is ample indication that the passage of the Tonkin Resolution should not be viewed as an endorsement of the legality of the war as a whole any more than its later repeal should be viewed as a repudiation of the war.⁵⁷ Several prominent Senators who voted for the Tonkin Resolution have been outspoken opponents of the war for several years and have denied their intention to give the President blanket authority to expand the combat theater. The argument on appropriations seems even weaker since it has been made abundantly clear by many Congressmen and Senators that votes for appropriations have reflected an overriding concern for the physical welfare of Americans in the battlefield. However misconceived and implausible such a rationale may be (*i.e.*, the welfare of American soldiers could be best safeguarded by earmarking appropriations "for withdrawal purposes only"), nevertheless it suffices to estab-

56. On the causal complexity of how major wars start, see A.J.P. TAYLOR, *THE ORIGINS OF THE SECOND WORLD WAR* (1961). See also the sources cited note 12 *supra*.

57. For a full consideration of the Tonkin Gulf Resolution, see sources cited note 32 *supra*. See also Resolution repealing Tonkin Gulf Resolution, H.J. Res. 1302, 91st Cong., 2d Sess. (1970).

lish the view that a vote for appropriations cannot properly be construed as a vote for the war.⁵⁸ In any event, congressional approval of the war is not strictly relevant to its legal status. Congress might (and often has) given its formal approval to executive policy that courts deem unconstitutional. The doctrines of judicial review and of constitutional supremacy as developed in American legal history presuppose that courts have the last word on issues of this kind. Obviously, the need for a court to reach a decision that challenges fundamental policy of both coordinate branches poses political problems of great delicacy for a society that prides itself on popular sovereignty and representative government, but these difficulties are not properly viewed as obstacles to adjudication. Especially where individual issues of life and death and collective issues of war and peace are concerned, the right of judicial redress seems to take clear precedence over the prospect of potentially harmful clashes among coordinate branches of government.

(5) *Judicial incapacity in the area of foreign affairs.* Taylor's argument that courts are severely restricted in the area of foreign affairs also seems unconvincing. There have been very few tests of the scope of judicial power in the area of foreign affairs, and these have been in relation to special circumstances favoring judicial prerogatives. The "political question doctrine" as a basis for deference seems to be the most persuasive ground on which to urge courts to side-step the legal issues raised by the Vietnam War, but even this argument is not very strong. As *Baker v. Carr*⁵⁹ made clear there is no fixed context for a "political question." In the present context, there seems to be a powerful basis in law and policy to reverse past dispositions of courts to treat all issues of foreign policy as falling within the domain of executive discretion and outside the domain of judicial scrutiny. Until the Kellogg-Briand Pact of 1928, no effort was ever made to outlaw aggressive war, but since that time numerous events have confirmed the growth of this prohibitive rule of law. As I have argued under (1), (2), and (3), there are no technical difficulties in the Vietnam context to prevent applying this rule in a substantive setting. In more general terms, the importance of this rule of international law, which is central to the United Nations Charter, makes it desirable for domestic courts to enforce it. The incapacity of the political organs of the United Nations to proceed effectively against a principal state, and the general

58. See Wooters, *The Appropriations Power as a Tool of Congressional Foreign Policy Making*, 50 B.U. L. REV. 34 (Special Issue, Spring 1970).

59. 369 U.S. 186, 211-13 (1962).

unavailability of an adjudicating tribunal on the global level, make it especially important to establish the responsibility of domestic courts in this area. It has been generally true that *domestic* courts have been far more important than international courts in developing and upholding international law. The particular situation, in which the United States is the most powerful actor on the world scene and is deeply involved in foreign military operations, makes it evident that if legal limits are going to be made relevant at all, these limits must be generated on a domestic level. Since the executive part of the government is already engaged in evolving the policy, normally with the acquiescence of Congress, the courts are the only conceivable arena in which a serious legal challenge can be mounted. Admittedly, such a position requires "a new patriotism" in which the national interest in law-abidingness in international undertakings is given an unprecedented priority.⁶⁰

I close this section with some general observations that go beyond the response to Taylor's specific arguments. Professor Taylor underestimated the strength of the Nuremberg imperative within our political culture when he wrote that "it is difficult to envisage other circumstances [than "total military victories"] that would unlock the secret files."⁶¹ Without "the wider logic," Daniel Ellsberg would probably not have been motivated to act as he did. It is significant to note that Ellsberg spoke of himself as a war criminal warranting prosecution before he apparently decided that he had a duty to unlock "the secret files."⁶²

The issues of separation of powers and "political question" seem an insufficient basis for judicial passivity. Legal criteria now exist by which to appraise a challenge directed at war policies.⁶³ The flow of power from Congress to the Executive in the war/peace area has badly distorted the constitutional notion of checks and balances. Where Con-

60. In this new patriotism the values embodied in the Charter of the United Nations would gradually displace Westphalia values so far as dominant modes of political consciousness are concerned.

61. Pp. 118-19.

62. Remarks, Conference, Princeton Univ., Apr. 19, 1971. See also Ellsberg's contributions in KNOLL & MCFADDEN, *supra* note 6, at 82-84, 158. "I speak not as a researcher but from the experience as a former official of the Defense Department and the State Department in Washington and Vietnam—experience that makes me a possible defendant in a future war crimes trial. Some ten years ago I read the transcript of the Nuremberg Trials, and that left me with the sense of what an exhibit in a war crimes trial looks like. As I was working in the Department of Defense, I did in some cases have a feeling while reading documents late at night that I was looking at future exhibits." *Id.* at 158.

63. For well-developed reasoning along these lines, see the decisions and briefs in *Berk v. Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970), *aff'd*, 429 F.2d 302 (2d Cir. 1970) (denial of preliminary injunction); *Orlando v. Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970).

gress fails to act and a clear issue of urgent national welfare is at stake, courts have an obligation to act.

Obviously, it is tempting for an American court to dispose of such issues as belonging to the province of the Executive or as having been resolved by subsequent congressional action that governs judicial action, but to yield to such temptation is to consign our institutions to a state of impotence during times of emergency. The differences between Nazi Germany and ourselves need to be stressed in considering the benefits and burdens that would result from allowing this conflict within our public consciousness to be dealt with by domestic courts. To shut off judicial redress leaves conflict to the streets; to control the streets is to initiate a program of "pacification" at home that seriously endangers the fragile institutions of our kind of democratic polity.⁶⁴

III. Nuremberg and the Present

In writing recently about the waning impact of the Pentagon Papers, Walter Pincus suggested that "[a] year from now, Dr. Daniel Ellsberg may look back and wonder why he did it."⁶⁵ As with the invasion of Cambodia in May 1970, the My Lai disclosures, and the Calley trial, the revelations of the Pentagon Papers have generated some temporary furor in the country, but have not exerted any decisive influence on either public opinion or government policies.⁶⁶ In each instance, the war persists, bureaucratic momentum is maintained, public apathy is restored, and the bipartisan elite that conceived and executed the Vietnam intervention remains in or close to power. There has been neither a turn against the war, nor against the war-makers, nor even against the military-industrial complex. To be sure, there are ripples of discontent, but the dominant mood of the country appears to stress the *continuity* between the recent past and the hoped-for future.⁶⁷

64. A cycle of rebellion and repression can be initiated whenever deeply-felt and widely-shared abuses cannot be redressed by recourse to normal grievance machinery. On the tendency of a cycle of rebellion and repression in foreign settings to be imported, see Ahmad, *Winning Hearts and Minds: The Theory and Fallacies of Counterinsurgency*, THE NATION, August 2, 1971, at 70-85, especially at 84-85.

65. Pincus, *After the Pentagon Papers: The Same Old Story*, N.Y. MAGAZINE, Aug. 16, 1971, at 46.

66. The news media emphasized the conflict between the government and the press with respect to the publication of the Pentagon Papers and failed to treat the substance of the disclosure with any depth of analysis or concern.

67. There is no serious disposition evident within the country to repudiate the counter-revolutionary foreign policy adopted by the United States in relation to the countries of Asia, Africa, and Latin America; it is this commitment to help foreign governments repress their own populations that underlay the involvement in Vietnam from the outset.

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If we consider this evidence of continuity from the perspective of the Nuremberg tradition, the implications are extremely discouraging. Interpreting Nuremberg for the benefit of German society in 1947, Karl Jaspers wrote that "[t]he essential point is whether the Nuremberg trial comes to be a link in a chain of meaningful, constructive political acts (however often these may be frustrated by error, unreason, heartlessness and hate) or whether, by the yardstick there applied to mankind, the very powers now erecting it will in the end be found wanting."⁶⁸ As of 1971, the United States has clearly not carried forward the Nuremberg tradition either with respect to the use of its military power against a foreign society or with regard to attitudes toward individual responsibility. Despite the evidence of war crimes, crimes against peace, and crimes against humanity, one detects neither public indignation of any magnitude nor any effort to hold the main policy-makers accountable to any degree for the moral consequences to Vietnam and to America of the involvement.⁶⁹ What public indignation there is has to do with *costs* and *failure*, that the war plans were too expensive given the interests at stake and that these plans did not accomplish the mission of securing South Vietnam for an anti-communist Saigon regime.⁷⁰ To discredit policy-makers for their failure to achieve stated goals is a normal accompaniment of any democratic system of political accountability. But it represents only a pragmatic, and not a normative basis of judgment,⁷¹ for such criticism happens also when the means and goals of policy were admirable.

68. K. JASPERS, *supra* note 1, at 59. Jaspers goes on in the same passage as follows: The powers initiating Nuremberg thereby attest their common aim of world government, by submitting to world order. They attest their willingness really to accept responsibility for mankind as the result of their victory—not just for their own countries. Such testimony must not be false testimony.

It will either create confidence in the world that right was done and a foundation laid in Nuremberg—in which case the political trial will have become a legal one, with law creatively founded and realized for a new world now waiting to be built. Or disappointment by untruthfulness will create an even worse world atmosphere breeding new wars; instead of a blessing, Nuremberg would become a factor of doom, and in the world's eventual judgment the trial would have been a sham and a mock trial. This must not happen.

On the counter-revolutionary drift of American foreign policy since World War II, see R. BARNET, *INTERVENTION AND REVOLUTION: THE UNITED STATES AND THE THIRD WORLD* (1968); G. MACEOIN, *REVOLUTION NEXT DOOR: LATIN AMERICA IN THE 1970's* (1971); R. STEELE, *PAX AMERICANA* (1967).

69. Accountability could also be achieved by paying reparations to the peoples of Indochina or by exonerating those who engaged in non-violent acts of war resistance. An atmosphere of reconciliation might be established by offering amnesty to war criminals, both as an acknowledgement of political reality and as a way of dealing with these questions in some non-punitive level of concern.

70. For an analysis of these principal options, see Falk, *What We Should Learn From Vietnam*, *FOREIGN POLICY*, Winter 1970-71, at 98-114.

71. And pragmatic tests of qualification also may be applied in situations where the normative objectives of statesmen were admirable.

This American repudiation of the Nuremberg tradition is part of a more general pattern of international behavior. The Soviet interventions in Eastern Europe, the French colonial wars in Indochina and Algeria, and the Anglo-French cooperation in the Suez campaign are examples of international conduct that appear to be criminal if measured by Nuremberg standards. These examples of criminality are taken only to show that none of the powers that sat in judgment at Nuremberg has kept the implicit promise of establishing a precedent for the future. Indeed it is a tribute to the public consciousness of America that the Nuremberg issue has been raised at all, although this consciousness also reflects the length, the frustrations, and the overall failure of the American effort in Vietnam. The basic international reality, tragic from the perspective of Nuremberg, is that world public opinion, at least as it has crystallized in the setting of the United Nations, neither expects nor insists upon carrying forward the Nuremberg tradition. This is partly because the pattern of repudiation seems so pervasive, and partly because there is no international capability to pass judgment upon the actions of a state that has not been utterly defeated in a war.⁷²

The failure of Nuremberg is a matter both of behavior and of public consciousness. On both levels the Nuremberg tradition has been virtually repudiated by the *governments* that dominate international life. The only open question is whether some popular movement could revive and sustain this tradition in defiance of the statist logic that prevails in international life. And it is for this reason that unorganized efforts by "peace criminals," peace groups, and journalists seem so important. They are important because the future of world society ultimately depends on keeping the promises of Nuremberg. For, again quoting Jaspers, "Ever since European nations have tried and beheaded their monarchs, the task of the people has been to keep their leaders in check. The acts of states are also the acts of persons. Men are individually responsible and liable for them."⁷³ Jaspers' book is especially relevant to the present discussion because he is so keenly aware of the small degree to which Nuremberg as an *external judgment*

72. Relation of international forces since World War II has not favored decisive endings of wars in which principal states have been significantly involved on either side. There have been withdrawals by major governments from positions of colonial occupation, but not wars in which the losing side surrenders and is occupied by the victorious side. Castro's regime in Cuba held trials of alleged "criminals" in the Batista regime after it gained power in January 1959. For a general study, with theoretical importance, see F. IKLÉ, *EVERY WAR MUST END* (1971).

73. JASPERS, *supra* note 1, at 55.

really disposed of the genuine issues for German society of coping with the Nazi experience. These issues have their proper locus within the national consciousness of the state that has acted in such criminal fashion. The external judgment by its externality tends to divert attention from the need to emphasize internal processes of renewal.⁷⁴

IV. Keeping the Nuremberg Idea Alive

My purpose here is to set forth very briefly some lines of constructive initiative. This discussion is based upon the assumption that it may well be impractical and undesirable to press for formal trials of those American political and military leaders principally responsible for the overall drift of the Vietnam involvement and for the main battlefield tactics. The formation of an American commission of inquiry into the issue of war crimes that would assemble evidence and draw conclusions on these questions could have a constructive impact.⁷⁵ It also seems essential for the moral status of law in American society that steps be taken to exonerate draft resisters, tax evaders, and others who committed non-violent "crimes" to manifest their opposition to the Vietnam War. There seems to be ample basis for the United States to pay reparations to Vietnam (and to Laos and Cambodia) to help overcome the war damage that has been done; these reparations should be gathered on as public a basis as possible, perhaps being collected from a one per cent income tax surcharge for a number of years and from cuts in the counter-insurgency portion of the Defense Department budget. In any event, the idea that American has some ongoing responsibility toward those war-ravaged societies seems essential for our civil health. This assertion of an American responsibility does not imply direct participation in post-war Indochina. Funds should be channeled through an international trust arrangement and given to the Indochina governments to spend according to their own priorities.

There are some other steps that can be taken even given the low state of public consciousness in these matters. Governments could press for a new world conference, on the order of the Hague Conference in 1899, to establish new laws of war incorporating, to the extent

74. For major repudiation of such external judgment, see E. VON SALOMON, *THE ANSWERS* (1954). But see C. FITZGIBBON, *DENAZIFICATION* (1969).

75. See DUFFET, *supra* note 2. See also Proceedings of the Oslo Commission of Inquiry into U.S. War Crimes in Indochina (1971) (mimeographed materials).

possible, both the normative (for instance, the Nuremberg experience and the United Nations Charter) and technological developments of the last several decades.⁷⁶ At a minimum, the process of preparing for such a conference would bring many of the issues into the field of awareness in a vivid way.⁷⁷ Participation by governmental delegations would reaffirm the restraints of law and morality upon the discretion of governmental officials, and the pressure to produce something tangible might lead to a renewal of the law of war on a realistic and effective basis. The international climate seems somewhat receptive to an initiative of this type, given such bloody struggles as those in Indochina, Nigeria, Pakistan, and the Middle East.

Another area of change involves structuring our own governmental system to make it more responsive to normative restraints in relation to warfare.⁷⁸ Congress could clarify its own relation to the Presidency and establish definite procedures to authorize limited objectives within fixed times and periods; in other words, except for an emergency response to a sudden attack, recourse to war should be based on specific congressional declaration, although it need not be technically treated as a Declaration of War.⁷⁹ If the President acted without such authorization or beyond its express terms, then he could be made subject to a series of congressional remedies ranging from censure to impeachment, and any Member of Congress should be given judicial access to seek declaratory, and possibly injunctive, relief. Congress could also grant the courts an express mandate to hear arguments about

76. It may not be realistic to suppose that governments would be willing to participate in such an endeavor given the widespread practice of counter-insurgency warfare. It may also be questioned whether the statist bias that would be likely to underlie such a world conference might not produce a code that was heavily weighted in favor of counter-insurgent preferences. These are real concerns, but not of sufficient weight to avoid the relapses into barbaric behavior that occur whenever a large-scale war of counter-insurgency takes place and relies upon high-technology weaponry. See JEAN-PAUL SARTRE, *ON GENOCIDE* (1968) and Ahmad, *supra* note 64.

77. The United Nations Conference on the Human Environment scheduled to take place in Stockholm in June 1972 is an example of an effort to use an intergovernmental conference setting to heighten awareness, as well as to fashion specific solutions to shared problems.

78. I do not feel optimistic about the prospects for major institutional developments on a global level, although important thinking is being done in support of such initiatives. See T. HOLTON, *AN INTERNATIONAL PEACE COURT: DESIGN FOR A MOVE FROM STATE CRIME TO WORLD LAW* (1970); *TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT* (J. Stone & R. Woetzel eds. 1970).

79. Requiring a Declaration of War might produce an excessively rigid procedure under certain circumstances, especially where the President was seeking to moderate the belligerent sentiments of Congress or the public. There is a danger in constitutional reform, as in military tactics, of designing a structure responsive to the last war rather than to the next one. Also, a Declaration of War, although presenting a threshold of inhibition, generates escalatory pressures in a powerful country to carry on with the war until victory and to stifle domestic opposition to the war as "treasonous."

the legal status of any war and confer standing upon individuals to seek judicial redress for alleged infringement of personal and property rights.

Of great potential importance would be the creation of some post within the government which would have responsibility for conforming the action of the country to the requirements of international law. This post could be conceived of as an Attorney General for International Affairs or as an Under-Secretary in a yet-to-be-created Department of Peace. The function of this job would be to report privately to the President on the legal status of any contemplated undertaking by the United States and to report publicly any doubts about the legal status of ongoing policies. Such a public official would serve notice on the President that legal consequences of foreign policy activity would receive explicit attention. Of course, there are many difficulties with such a proposal:

—How does one prevent the government official entrusted with the task of being an international law watchdog from becoming a presidential lap dog?

—How does one take account of reasonable differences of opinion as to the requirements of international law, requirements that are often controversial in the extreme, especially in determining "aggression," "armed attack," and "self-defense"?

—How can such a public official gain access to the facts upon which a persuasive legal appraisal depends?

—How can an international law argument prevail in relation to a determined President, a militant Congress, a mobilized electorate?

—How would such legal judgment be enforced?

—How should account be taken of the failure of "the other side" to show comparable respect for the restraints of international law?

These difficulties are generally characteristic of efforts to bring law to bear on human behavior. Pitfalls, weaknesses and ambiguities are unavoidable at all levels of social and political organization. Nevertheless, the legal approach seems a valid method of inhibiting aggressive war-making and discouraging criminal methods of warfare. The national and human peril of allowing the discretion of governmental centers of power and authority to determine the occasions and character of warfare seems clear enough. We need to build barriers against war-making carried on in the name of national populations who are often victimized by the process without ever participating in it. In general, the next great movement of mankind needs to involve decisive

action by the public "to keep their leaders in check" in the area of war and peace.

The sorts of steps that I have outlined are intended only to indicate a sense of direction on the most immediate level of response. In more fundamental terms, I am persuaded by the view so eloquently and persuasively held by J. Glenn Gray that "to resolve the problem of warfare, civil or international," requires that "a transformation of a deepgoing inner sort will have to come over men."⁸⁰ I also share Gray's view that "a changed attitude toward our habitat must precede—or at least accompany—a changed attitude toward our fellow man."⁸¹

Law is largely a dependent variable in both accomplishing and sustaining change, although it may symbolize emerging human aspirations and precede a wider social adjustment to new challenges. The Nuremberg idea needs to be understood as a statement both of aspiration and of necessity. Our indebtedness to Telford Taylor, Daniel Ellsberg, and the Berrigans is essentially the same: they remind us of our ideals in a period of national and international danger. And Taylor has further demonstrated that in earlier days of triumph we even acted to translate these ideals into norms of judgment and conduct. The question before all of us, at this time, is whether we who originally lit the Nuremberg torch can keep it aflicker in these times of barbarism. This question will not be answered affirmatively by governments, but only by popular forces who are committed to building a new world order in which tenderness toward nature and fellow man is the basis of organization and action. It is this greater struggle that is being prefigured by the debate surrounding Nuremberg and Vietnam.

80. J. GRAY, *supra* note 51, at 37. See also J. GRAY, *THE WARRIORS: REFLECTIONS ON MEN IN BATTLE* 215-42 (1959).

81. J. GRAY, *supra* note 51, at 41. This is also the basic argument on overcoming war in R. FALK, *THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL* (1971).